No. 97-843

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AURELIA DAVIS, as next friend of LASHONDA D.,

Petitioner,

—v.—

MONROE COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* NOW LEGAL DEFENSE AND EDUCATION FUND *ET AL.* (ADDITIONAL *AMICI* LISTED ON INSIDE COVER) IN SUPPORT OF PETITIONER

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December 19, 1997

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AMERICAN JEWISH CONGRESS
CALIFORNIA WOMEN'S LAW CENTER
CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC.
EMPLOYMENT LAW CENTER
EQUAL RIGHTS ADVOCATES
NATIONAL CENTER FOR LESBIAN RIGHTS
NORTHWEST WOMEN'S LAW CENTER
TEXAS CIVIL RIGHTS PROJECT
TITLE IX ADVOCACY PROJECT
WOMEN'S LEGAL DEFENSE FUND

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL STATUES AND REGULATIONS

STATE STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

Amici curiae are organizations strongly committed to achieving equality for women, each with an abiding interest in ensuring the sound interpretation and application of the provisions contained in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1688 ("Title IX") that protect students against sexual harassment in schools. Descriptions of the individual organizations are set forth in the attached Addendum.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court.[1]

REASONS FOR GRANTING THE PETITION

Sexual harassment in schools poses an issue of grave national importance because it threatens the development and education of school children throughout our country. Peer sexual harassment, the most common form of sexual harassment in schools, causes the same discriminatory harm as other types of sexual harassment that this Court already has recognized are redressed by our country's anti-discrimination laws. Yet the decision below carves peer sexual harassment out of the range of discriminatory conduct prohibited by Title IX. See Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (en banc). Sociological and anecdotal evidence confirm both the harmful effects of peer sexual harassment and schools' abilities to mitigate the problem. The Eleventh Circuit

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[1] This brief was authored by the amici and counsel listed on the front cover of this brief, and was not authored in whole or in part by counsel for a party. No one other than the amici and their counsel made any monetary contribution to the preparation or submission of this brief.

majority authorizes school officials to stand by and do nothing in the face of hostile environment sexual harassment in their schools when the hostile environment is created by students. This Court's review is needed to reverse that erroneous decision, which misinterprets an important question of federal law, conflicts with this Court's prior holdings, and jeopardizes the equal educational rights of all students nationwide.[2]

ARGUMENT

I. The Decision Below Exposes Women And Girls Nationwide to Significant Discriminatory Harm

Each time it has addressed the issue, this Court unanimously has recognized that sexual harassment produces serious, discriminatory harm, and that institutions such as workplaces and schools must take reasonable steps to eliminate or reduce its occurrence. See Harris v. Forklift Sys., 510 U.S. 17, 21 (1993); Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75 (1992); Meritor Savings Bank,

[2] Resolution of the two sexual harassment cases in which this Court recently granted petitions for certiorari, Faragher v. City of Boca Raton, 111 F.3d 1530 (11th Cir. 1997) (en banc), cert. granted, 1997 U.S. LEXIS 7042 (Nov. 14, 1997), and Doe v. Lago Vista, 106 F.3d 1223 (5th Cir. 1997), cert. granted, 1997 U.S. LEXIS 7337 (Dec. 5, 1997), still leaves unresolved the question whether Title IX provides redress for peer sexual harassment, the central question presented by this petition. The vicarious liability standard for sexual harassment by supervisors or teachers, respectively, which is at issue in those cases, is different from the standard for liability in peer sexual harassment cases, under which schools would be held liable when they knew or should have known of peer sexual harassment and failed to take prompt and effective immediate action to remedy it.

FSB v. Vinson, 477 U.S. 57, 66 (1986).[3] Title IX mandates the elimination of all types of sex discrimination, which includes sexual harassment, whether committed by teachers, as was the case in Franklin, or by students, as is the case in Davis. See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (directing courts to accord Title IX "a sweep as broad as its language").

In both the workplace and in schools, sexual harassment has dramatic consequences of national significance. Several recent empirical studies of student populations confirm both the presence and harmful impact of sexual harassment in schools, whether it is committed by teachers or by students. See Texas Civil Rights Project, Peer Sexual Harassment: A Texas-Size Problem at 13 (Oct. 1997) (hereinafter Texas Survey) (76% of girls reported experiencing some form of sexual harassment in school); Valerie Lee et al., The Culture of Sexual Harassment in Secondary Schools, 33 A. Educ. Res. J. 383, 397 (1996) (hereinafter Secondary Schools) (83% of the girls reported having been sexually harassed); Permanent Comm'n on the Status of Women, In Our Own Back Yard: Sexual Harassment in Connecticut's Public High Schools at 10 (Jan.1995) (hereinafter Our Own Backyard) (92% of girls reported at least one type of unwanted sexual behavior); Nan Stein et al., Secrets in

[3] Consistent with this Court's previous sexual harassment rulings but contrary to the Davis opinion, the Department of Education's Office for Civil Rights ("OCR") also recognizes schools' obligations under Title IX to take immediate and appropriate steps to remedy known peer sexual harassment. See Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, 62 Fed. Reg. 12,034, 12,039 (1997) ("OCR Guidance"). As the administrative agency charged with enforcing Title IX, see 34 C.F.R. §§ 106.1-106.71 (1992), this Court normally defers to OCR's interpretation of Title IX. See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982).

Public: Sexual Harassment in Our Schools at 2 (1993) (hereinafter Secrets in Public) (83% of the girls were touched, pinched or grabbed; and 39% reported some form of sexual harassment on a daily basis in the last year); AAUW Educational Foundation, Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools at 7-8 (1993) (hereinafter Hostile Hallways) (85% of the girls reported experiencing some form of unwanted and unwelcome sexual behavior; of those girls, 65% were touched, grabbed, or pinched in a sexual way; and 66% reported experiencing at least one form of harassment occasionally"); see also Bernice R. Sandler & Robert J. Shoop, Sexual Harassment on Campus: A Guide for Administrators, Faculty, and Students, (1997) (referencing studies conducted of sexual harassment in post-secondary education) (hereinafter Sexual Harassment on Campus).

Peer sexual harassment is the most common form of harassment students experience. See Texas Survey at 19 (89% of most serious harassment was committed by other students); Sexual Harassment on Campus at 13 (between 70 and 90% of undergraduate women reported at least one incident of serious sexual harassment by a male student); Our Own Backyard at 23 (76% of the harassment was committed by other students); Hostile Hallways (79% of students reported sexual harassment by other students); Secrets in Public at 6 (96% of students reported sexual harassment by other students).

Whether caused by teachers or by other students, sexual harassment causes real and demonstrable harm to students' educational and social development. Sexually hostile environments reduce female students' class participation and cause girls to drop out of classes entirely. See Bernice R. Sandler, The Chilly Classroom Climate: A Guide to Improve

the Education of Women, 15-17, 19 (Nat'l Ass'n for Women in Educ. 1996); see also Hostile Hallways at 15-16 (33% of the girls who suffered sexual harassment reported not wanting to attend school; 32% reported not wanting to talk as much in class; 28% found it harder to pay attention in school; and 18% reported thinking about changing schools); Sexual Harassment on Campus at 57 (reporting that peer sexual harassment may cause female college students to drop classes, change majors or schools, or drop out of college). Like sexually harassed employees, sexually harassed students choose to withdraw from educational activities rather than "run the gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education." Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 171 (N.D.N.Y. 1996); cf. Meritor, 477 U.S. at 67 (recognizing that Title VII protects employees from having to run a gauntlet of sexual abuse at work).[4]

School officials are in a unique position to intervene. Most episodes of harassment do not occur in private or secluded places, but happen in classrooms and other areas where teachers, administrators and other school employees patrol and control student conduct. See Texas Survey at 19, 21 (63% of girls reported that the most serious incidents of harassment occurred in the classroom; 68% of girls reported that a teacher or school administrator was present during the most serious incident of harassment); Hostile Hallways at 24 (55% of those who had been harassed identified the classroom as the location of the incident; 66% of students

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[4] The facts of this case exemplify the harms documented in the studies and recognized by courts. The complained-of harassment caused LaShonda Davis such mental anguish that her grades dropped over the period of harassment; it lead her to write a suicide note before finally leaving the school. Id. at 1394.

who had been harassed reported being harassed in the school hallway); Our Own Backyards at 15 (44% of students reported incidents of sexual harassment in the classroom; 62% reported incidents in the hallway). Despite the evidence that school officials often are well-positioned to address this issue, the Davis decision allows them to ignore peer sexual harassment, permitting sexually hostile educational environments to thrive, at great cost to our country's children. This Court's review is needed to ensure that school officials take action to fulfill Title IX's mandate to eliminate all sex discrimination in schools.

II. The Decision Below Exacerbates Sexual Harassment And Its Attendant Harms By Permitting Schools To Ignore Peer Sexual Harassment Complaints

By misconstruing the range of responses available to schools and by eviscerating schools' Title IX obligations to take any preventive or remedial actions to address peer sexual harassment, the Davis majority leaves schools without any incentive to address the problem. Such a response defies this Court's emphasis on sexual harassment policies and grievance procedures as a means to prevent such discrimination and exacerbates, rather than reduces, the harm targeted by Titles VII and IX. See Meritor, 477 U.S. at 72-73; accord Jansen v. Packaging Corp. of America, 123 F.3d 490, 495 (7th Cir. 1997) (Flaum, J. writing for plurality) (recognizing that deterrence, achieved through implementing sexual harassment policies, should be the primary goal in addressing sexual harassment).

A. Schools Can and Should Take Many Steps To Reduce Sexual Harassment And Its Accompanying Harm.

The Davis decision raises an issue of grave national importance because it allows schools to ignore peer sexual harassment complaints rather than take any of the steps, including implementing sexual harassment policies and procedures, that have been proven to help reduce the problem. By permitting a school to ignore a complaint of peer sexual harassment, the Davis decision endorses policies that exacerbate the educational and emotional harm suffered by students who are sexually harassed. See Stephanie H. Roth, Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education, 23 J.L. & Educ. 459, 466-69 (1994); JoAnn Strauss, Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions, 10 Law & Ineq. J. 163, 176-77 (1992) (describing state agency finding that school's failure to take immediate action in response to student sexual harassment contributes to hostile environment).

Yet many courts have recognized schools' crucial role in reducing the destructive effects of peer sexual harassment. As one court reasoned in a case involving sexual harassment between students: "[g]iven the extremely harmful effects sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools." Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1020 (W.D. Mo. 1995) (citing Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1401-02 (9th Cir. 1994)). Courts correctly have been driven by the understanding that "[t]he distinctions between the school environment and the

workplace serve only to emphasize the need for zealous protection against sex discrimination in the schools." Patricia H. v. Berkeley Unified. Sch. Dist., 830 F. Supp. 1288, 1293 (N.D. Cal. 1993)); accord Oona v. Santa Rosa City Schs., 890 F. Supp. 1452, 1467 (N.D. Cal. 1995), aff'd, 122 F.3d 1207 (9th Cir. 1997).

The specter of liability could provide an incentive for schools to intervene in response to sexual harassment complaints. Studies repeatedly have shown that adopting and implementing policies, procedures and training programs dramatically can improve schools' responses when problems arise and can reduce the incidence of sexual harassment. See Elizabeth A. Williams, et al., Impact of University Policy on the Sexual Harassment of Female Students, 63 J. Higher Educ. 50, 57, 59, 62-63 (1992) (finding that continued and intensive sexual harassment education increased awareness and reduced sexual harassment in schools); Sexual Harassment on Campus at 55 (reporting higher incidence of peer sexual harassment on college campuses that failed to adopt or enforce a sexual harassment policy and fail to respond to sexual harassment complaints). Appropriate training for teachers and other school personnel enables them to address and respond effectively to peer sexual harassment complaints. Cf. Helen K. Dolan, The Fourth R- Respect: Combating Peer Sexual Harassment in the Public Schools, 63 Fordham L. Rev. 215, 243 (1992) (citing student reports that schools' lack of policies deter reporting).

Reasoned, preventative measures and responses have been shown to reduce sexual harassment. Two separate studies of undergraduate students document that male students who participate in sexual harassment training programs become more aware of what constitutes sexual

harassment. See Douglas D. Smith, The Efficacy of a Selected Training Program in Changing Perceptions of Sexual Harassment (1993) (unpublished Ph.D. dissertation, University of Northern Colorado) (on file at NOW LDEF); Kathleen Beauvais, Workshops to Combat Sexual Harassment: A Case Study of Changing Attitudes, 12 Signs 130, 130-45 (1996); see also Nan M. Higgenson, Addressing Sexual Harassment in the Classroom, 53 Educ. Leadership 93-96 (1993); Robert Shoop & Debra L. Edwards, How to Stop Sexual Harassment in Our Schools: A Handbook and Curriculum Guide, 142-48 (1994) (training programs in Minnesota and Nebraska increased awareness and reduced sexual harassment in schools).

Consistent with those studies, the OCR has construed Title IX to require schools to adopt and publish grievance procedures in order to discover and remedy sexual harassment as early as possible. OCR Guidance at 12,044-45; see also 34 C.F.R. § 106.8(b) (1997) (requiring schools receiving federal funds to adopt and publish grievance procedures for prompt and equitable resolution of complaints that the school violated Title IX). The OCR encourages students to bring problems to the school's attention before a hostile environment develops and recommends training administrators, teachers, and staff about sexual harassment. OCR Guidance, at 12,044-45. State education codes similarly encourage schools to adopt sexual harassment policies. California, Florida, Michigan, Minnesota, Texas, Vermont, and Washington all require school districts, or a similar local governing body, to formulate and implement sexual harassment policies.[5] At least two states specify that

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[5] See Cal. Ed. Code § 212.6 (1996) (requiring all educational institutions to have, publish, and display written policy on sexual harassment that includes information on obtaining rules and procedures for reporting

schools' policies should cover peer sexual harassment.[6]

Empirical studies of research on workplace sexual harassment confirm that comprehensive policies and training programs effectively curb sexual harassment. Companies that have implemented sexual harassment training programs have been less likely to see claims develop into lawsuits. See Crackdown on Sexual Harassment, 6 CQ Researcher 625, 633-34 (July 19, 1996) (in survey of 456 mid-size and large companies, 8% of companies with sexual harassment training programs were sued, as opposed to 12% of those without such programs). Commentators similarly have concluded that a prevention program, including well-communicated policies and effective training programs, is the single most important solution to reducing sexual

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charges of sexual harassment and for pursuing available remedies); Fla. Stat. § 230.23 (6)(d) (1996) (requiring that each school district adopt code of student conduct which must state that violation of the school board's sexual harassment policy may be grounds for suspension, expulsion, imposition of disciplinary action, or imposition of criminal penalties); Minn Stat. § 127.455 (1996) (requiring that Commissioner of Children, Families, and Learning make available to school boards model sexual harassment policy, and that each school board submit to the Commissioner the sexual harassment policy it has adopted); Texas Educ. Code § 37.083 (1997) (requiring that each school district adopt and implement sexual harassment plan); 16 V.S.A. § 565 (1996) (requiring that each school district adopt and make available policy that prohibits harassment of students, and provides appropriate remedial action for staff and students who commit harassment).

[6] See MSA § 15.41300(1) (1996), MCL § 380.1300 a (requiring that each school district adopt and implement sexual harassment policy prohibiting sexual harassment by school district employees and pupils directed toward other employees or pupils); Rev. Code. Wash. (ARCW) § 28A.640.020 (1996) (requiring that every school district adopt, implement, and post written policy regarding sexual harassment that applies to all school district employees, volunteers, parents, and students and that includes conduct between students).

harassment at work. See Judith I. Avner, Sexual Harassment: Building a Consensus for Change, Kan. J.L. & Pub Pol'y 57, 74 (Spr. 1994); Ellen J. Wagner, Sexual Harassment in the Workplace, 110, 119 (1983); see also Panelists Say Education is Essential to Effective Harassment Prevention Policy, 66 U.S.L.W. 2271 (Nov. 4, 1997).

Holding schools liable for failing to address peer sexual harassment and for their failure to adopt, publish and implement a Title IX policy provides a compelling incentive for schools to take these critical steps. See Strauss, supra, at 178, Carrie N. Baker, Proposed Title IX Guidelines on Sex-Based Harassment of Students, 43 Emory L.J. 271, 307 (1994); Jollee Faber, Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment, 2 UCLA Women's L.J. 85, 91 (1992); cf. Owen v. City of Independence, 445 U.S. 622, 652 n. 35 (1980) (recognizing the threat of liability as a powerful incentive for spurring employers to refrain from violating employees' constitutional rights). By eliminating peer sexual harassment from the range of discrimination prohibited by Title IX, the Davis majority defies all of this guidance and instead encourages school officials to bury their heads in the sand.

B. The Decision Below Is Based On A Flawed Analysis Of The Range Of Schools' Responses To Peer Sexual Harassment Complaints

In rejecting wholesale Title IX's applicability to peer sexual harassment cases, the Davis court ignores our national policy and expectation that school officials monitor and shape students' behavior. The Davis court casts aside schools' duties to stop peer sexual harassment because students are not agents of the school, ignoring the reality of

interactions between school officials and students. See Davis, 120 F.3d at 1399-1400 n. 13; see also id. at 1401 (Tjoflat, J.) (presuming that schools would either have to expel or suspend accused harassers immediately if schools were held accountable for peer sexual harassment).[7] That conclusion conflicts with the OCR's mandates and the wisdom of courts, state legislatures, and the empirical data, each of which recognizes the wide range of responsive measures school officials can and should invoke to respond to and reduce peer sexual harassment.

Contrary to the Eleventh Circuit's constrained view, school officials' responses to sexual harassment, like their responses to other forms of discrimination and student misconduct, can range from counseling and warnings, to education and training, to severe discipline such as suspension or expulsion when other efforts prove ineffective. See OCR Guidance at 12,043 (recognizing the range of appropriate responses to complaints of peer sexual harassment, including counseling, warning, incremental disciplinary action); cf. Cal Ed. Code § 48900.2 (1996) (enumerating differential disciplinary responses to sexual harassment complaints depending on the facts of the allegation); Minn. Stat. § 127.46 (1996) (same); see also Sexual Harassment on Campus at 59-61 (documenting range of possible responses to peer sexual harassment). A school's response to any specific complaint will vary according to each situation. See, e.g., OCR Guidance at 12,042 ("[w]hat constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances").

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[7] This portion of Judge Tjoflat's majority opinion was not joined by any other members of the court. See id. at 1407 n.1 (Carnes, J., special concurrence).

Indeed, courts have recognized the range of responses schools can employ in peer sexual harassment cases. See, e.g., Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1386 (N.D. Cal. 1997) (discussing steps reasonably calculated to end the harassment in relation to its frequency and severity); see also Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 578-79 n.7 (10th Cir. 1990) (recognizing the range of responses available to an employer once it is on notice of a sexually hostile work environment).

Consistent with that guidance but contrary to Judge Tjoflat's suggestion, the Monroe County Board of Education and the Hubbard school had available a range of responses to Ms. Davis' complaints. They were not limited to the extremes of either completely failing to respond or immediate suspension or expulsion, as feared by Judge Tjoflat. See Davis, 120 F.3d at 1401 (Tjoflat, J.). School officials could have investigated the complaint, permitted Ms. Davis to change her seat so that she did not have to sit next to the alleged harasser for three months, or imposed progressive discipline. See id. at 1393. The decision below erroneously limits school officials' traditional and routine roles and eliminates their responsibilities for remedying hostile environment sexual harassment, permitting schools to violate Title IX.

III. The Decision Below Would Eviscerate Federal Anti-discrimination Law's Prohibition of Discrimination In Schools.

This Court's review also is needed to address faulty public policy presumptions about the liability that would result from holding schools responsible for peer sexual harassment. The opinion of one judge raises the specter of

"whipsaw" and "sky-rocketing" liability as a justification for exempting schools from any obligation to respond to peer sexual harassment complaints. Davis, 120 F.3d at 1401 (Tjoflat, J.). That reasoning violates the fundamental premise of federal anti-discrimination laws, which courts successfully have enforced in many contexts without infringing on due process rights or wreaking financial havoc on public institutions.

In rejecting Title IX's coverage of peer sexual harassment, Judge Tjoflat's opinion cited fears that schools would face the untenable predicament of being held liable either by harassers if they take action to address sexual harassment complaints, or by victims if they fail to respond. Id. at 1401. Yet, rather than infringing on students' due process rights, a school policy that requires school officials to respond to peer sexual harassment complaints would provide a vehicle for accommodating alleged offenders' due process rights. For example, the OCR Guidance recommends conducting prompt, thorough and impartial investigations, OCR Guidance, at 12,042, and specifically directs schools to protect students' due process rights when implementing sexual harassment policies. Id. at 12,045. As the Guidance recognizes, "procedures that ensure the Title IX rights of the complainant while at the same time according due process to both parties involved will lead to sound and supportable decisions." Id. at 12,045.

Moreover, school officials routinely fulfill their obligations to enforce anti-discrimination and other laws notwithstanding the specter of liability if they overstep their bounds. For example, schools may be liable for teacher-to-student sexual harassment under Title IX, see Franklin, 503 U.S. at 74; are charged with protecting students from race discrimination under Title VI of the Civil Rights Act of

1964, 42 U.S.C. §§ 2000d et seq. ("Title VI"), see United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 389 (5th Cir.) (en banc), cert. denied sub nom, 389 U.S. 840 (1967); and owe students a duty of care under tort law, see Dailey v. Los Angeles Unified Sch. Dist., 2 Cal.3d 741, 747 (1970); Acosta v. Los Angeles Unified Sch. Dist., 31 Cal. App. 4th 471, 477 (1995). No court has permitted schools to ignore those legal obligations based on the possibility that they may be sued for violating due process rights.

As Judge Carnes' concurring opinion notes, Judge Tjoflat's reasoning would eviscerate state officials' obligations to comply with a range of laws in a variety of settings, including jails and prisons. Davis, 120 F. 3d at 1409 (Carnes, J., concurring). It would eliminate public institutions' exposure to liability for violating Constitutional or statutory rights as enforced under 42 U.S.C. § 1983. See generally Owen v. City of Independence, 445 U.S. 622 (1980); Monroe v. Pape, 365 U.S. 167 (1961), overruled in part on other grounds by Monell v. Dep't of Social Servs., 436 U.S. 658 (1978). It defies public agencies' obligations to respond to complaints of sexual harassment at work, in which they must similarly respect the accused's due process rights. See, e.g., Lindsey v. Shalmy, 29 F.3d 1382 (9th Cir. 1994); Bator v. Hawaii, 39 F.3d 1021 (9th Cir. 1994); Carrero v. New York City Housing Auth., 890 F.2d 569 (2d Cir. 1989); Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

Judge Tjoflat's decision also erroneously predicts a "substantial" amount of litigation if peer sexual harassment is recognized as a violation of Title IX. 120 F.3d at 1405-06. As an initial matter, that discussion incorrectly references the

Hostile Hallways study, which provides a description of the scope and nature of sexual harassment rather than a prediction or analysis of the viability of potential lawsuits.[8] Moreover, the opinion's premise is logically defective. Schools' desires to avoid monetary damages should compel them to comply with well-established statutory and constitutional standards rather than providing a rationale for eliminating anti-discrimination protections. Taking Judge Tjoflat's concern to its logical conclusion, any public institution could cry "financial ruin" to avoid liability for violating civil rights laws. This flies in the face of our national commitment to civil rights laws, which specifically prohibit discrimination and provide a remedy for the harm that results when it goes unchecked.[9] Certainly, the specter of uncovering widespread violations of anti-discrimination laws should provide an incentive for education, prevention and enforcement rather than an excuse to eliminate liability. Judge Tjoflat's opinion, and the majority decision, articulate no principle for distinguishing peer sexual harassment suits from all other civil rights claims. This Court should grant the petition to uphold the viability of our country's anti-discrimination laws and to confirm that schools can best avoid liability by complying with, rather than ignoring Title IX's mandate to eliminate all sex discrimination in our federally-funded schools.

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[8] In any event, studies of sexual harassment at work show that of women who experience sexual harassment and attempt some form of response, only six percent make formal reports. See U.S. Merit Systems Protection Bd., Sexual Harassment in the Federal Workplace at viii (1995).

[9] See, e.g., 42 U.S.C. § 2000e (Title VII) (prohibiting discrimination based on race, color, religion, sex, or national origin); 42 U.S.C. § 2000d (Title VI) (prohibiting discrimination on race, color, or national origin); 29 U.S.C. § 621 (Age Discrimination in Employment Act); 42 U.S.C. § 12101 (Americans with Disabilities Act).

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to grant the petition for certiorari to correct the Davis majority's distinction of peer sexual harassment from other forms of sexual harassment and to confirm that Title IX proscribes all forms of sexual harassment in schools, whether committed by teachers or by students.

Respectfully submitted,

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ADDENDUM

Statements of Interest

American Association of University Women

The American Association of University Women (AAUW) has worked since 1881 to promote equity and education for all women and girls. AAUW's 162,000 members are women and men college graduates committed to ensuring equal educational opportunity for all. Vigorous enforcement of Title IX is a priority issue for AAUW, which has urged its members to take action on the findings of *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools*. Released by the AAUW Educational Foundation in 1993, *Hostile Hallways* documented that sexual harassment is a daily occurrence in public schools and that it has severely negative effects on the education of both female and male students.

American Jewish Congress

The American Jewish Congress Commission for Women's Equality is an activist leadership group of Jewish women which seeks to pursue equal rights for women within a Jewish context. As an arm of the American Jewish Congress it has filed numerous briefs in the Supreme Court concerning abortion and reproductive rights and sexual discrimination and harassment. It believes that women, particularly young women in a school setting, cannot reach their full potential if they are sexually harassed by their fellow students. It further believes that Title IX of the Education Amendments of 1972 requires school authorities to protect students against peer harassment.

California Women's Law Center

The California Women's Law Center (CWLC) is a policy and advocacy organization dedicated to advancing and securing the civil rights of women and girls. The CWLC uses a variety of novel approaches and collaborations to meet the legal needs of women and girls. The CWLC was established in 1989 and addresses the following priority areas and the relationship between those areas: Sex Discrimination, including sex discrimination in education, Reproductive Rights, Family Law, Violence Against Women and Child Care.

Connecticut Women's Education and Legal Fund, Inc.

The Connecticut Women's Education and Legal Fund, Inc. (CWEALF), is a non-profit women's rights organization. Incorporated in 1973, CWEALF has over 1,400 members. The mission of the organization is to work through legal and public policy strategies and community education to end sex discrimination in the state's education, judicial, social service, and employment systems. For nearly 25 years, CWEALF has been a leader in Connecticut in working on the issue of sexual harassment. We provide legal information and referral to women on a daily basis who face sexual harassment in the workplace; we conduct training on sexual harassment prevention to managers and workers, students and teachers; and we write *amicus curiae* briefs and provide technical assistance to policy makers in order to improve laws dealing with sexual harassment.

Employment Law Center

The Employment Law Center (ELC), a project of the Legal Aid Society of San Francisco, is a private, non-profit, public interest law firm which represents indigent workers in cases involving employment discrimination and workplace

rights. The ELC specializes in, among other areas of the law, sex discrimination.

The ELC was counsel of record for Katherine Vinson in *Vinson v. Superior Court*, 43 Cal. 3d 833, 239 Cal. Rptr. 292 (1987), in which the California Supreme Court ruled that a mental examination is not warranted in a simple sexual harassment case where the claimant seeks compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal.

Prior to the *Vinson* case, the ELC was counsel of record in *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Ca. 1983), a sexual harassment case in which the Court denied discovery of detailed information about plaintiff's sexual history, including the name of each person with whom she had sexual relations in the ten years prior to the defendants' discovery request.

The ELC represented Lillian Garland in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), which upheld California Government Code Section 12945(b)(2), a state law which provides up to four months of pregnancy disability leave and a right to return to the same or similar job.

The ELC also represented Queen Foster in *Johnson Controls, Inc. v. Fair Employment & Housing Commission*, 218 Cal. App.3d 517, 167 Cal. Rptr. 158 (1990), where the California Court of Appeal ruled that the employer's gender-based exclusionary "fetal protection" policy violated the Fair Employment and Housing Act. The ELC also appeared as *amicus curiae* in the United States Supreme Court in *International Union, UAW v. Johnson Controls*, 499 U.S. 187, 111 S. Ct. 1196 (1991), in which the Court held that the employer's "fetal protection" policy constituted sex discrimination prohibited by Title VII of the Civil Rights Act

of 1964.

The ELC has participated as *amicus curiae* in many discrimination cases before the United States Supreme Court, including *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986), *reh. den.* 478 U.S. 1014 (1986).

Equal Rights Advocates

Equal Rights Advocates (ERA) is one of the country's oldest women's law centers. ERA is dedicated to empowerment of women through the establishment of their economic, social, and political equality. Beginning in 1974 as a teaching law firm specializing in issues of sex-based discrimination, ERA has evolved into a legal organization with a multifaceted approach to addressing women's issues including litigation, advice and counseling, public education and public policy initiatives. Since its early days, ERA has worked to end sexual harassment. ERA represented the plaintiff in the first case in the Ninth Circuit Court of Appeals to find sexual harassment a violation of Title VII, *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). ERA has continued its efforts to eradicate sexual harassment through litigation, public policy initiatives, and counseling hundreds of individual women on their legal rights, and was co-counsel in *Doe v. Petaluma City School District*, the first case to recognize a cause of action for peer sexual harassment under Title IX.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in

support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is eliminating barriers that deny women and girls equal opportunity, such as sexual harassment. For years, NOW LDEF has fought for educational equity for girls. In April 1993, NOW LDEF and the Wellesley College Center for Research on Women released the results of a survey on sexual harassment in schools that they conducted through Seventeen magazine. NOW LDEF was co-counsel in *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993) reconsid. granted, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case to recognize a cause of action for peer sexual harassment under Title IX. NOW LDEF has appeared as amicus in numerous other cases concerning girls' rights to be free from sexual harassment and sex discrimination in the schools, including *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028 (1992).

National Center for Lesbian Rights

Founded in 1977, the National Center for Lesbian Rights (NCLR) is a national public interest law organization that advocates for women and men who confront discrimination on the basis of their sexual orientation. NCLR is particularly dedicated to combating discrimination on the basis of gender and sexual orientation in public schools, and to ensuring that all students have an equal opportunity to learn in an environment of safety and respect.

Northwest Women's Law Center

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization that works to advance the rights of all women through litigation, education, legislation and the provision of legal information and referral services.

Founded in 1978, the NWLC has been dedicated to challenging barriers to sexual equality in education with a focus on the barriers created by sexual harassment. Toward that end, the NWLC has participated in cases throughout the country to ensure the availability of legal remedies for victims of sexual harassment. The NWLC also conducts sexual harassment in education workshops, produces legal rights education materials on the issue, and has led numerous legislative efforts to protect and advance the legal rights and remedies available to victims of sexual harassment in school. The NWLC has a strong interest in the present case in ensuring that Title IX of the Education Amendments of 1972 is interpreted to provide the fullest possible protection to students against sexual harassment in school.

Texas Civil Rights Project

The Texas Civil Rights Project is a statewide civil rights litigation and education project. In operation since 1990, the Project seeks to promote social and economic justice. Since Fall 1993, the Texas Civil Rights Project has devoted significant resources towards Title IX litigation and education. The Project operates Stop Harassment in Public Schools (SHIPS), the nation's only full-time sexual harassment prevention project. SHIPS provides community training, conducts education research, and publishes resource son sexual harassment prevention and curriculum.

Title IX Advocacy Project

The Title IX Advocacy Project (The Project) is a youth empowerment and legal advocacy organization that works with young people and their adult allies to promote gender equity in middle schools and high schools in the greater Boston area. The Project was founded in September 1994 and currently focuses on addressing sexual harassment in schools,

discrimination against pregnant and parenting students, and gender inequity in school-based sports programs. The Project facilitates sexual harassment workshops at schools, community centers, and conferences, sponsors peer education programs, develops age-appropriate and culturally sensitive policies to remedy sexual harassment in school, and creates and disseminates resource materials for young people and adults. In January 1998 The Project will commence a "Student Representative Program" to provide legal advice and assistance to young people who face sex discrimination in their schools. To date, we have provided information and assistance to more than 2,000 students and 350 adults.

Women's Legal Defense Fund

Founded in 1971, the Women's Legal Defense Fund (WLDF) is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. WLDF has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of anti-discrimination laws. WLDF has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs amicus curiae in the federal circuit courts of appeal to advance women's opportunities in education.